

**SOAH DOCKET NO. 582-10-5281
TCEQ DOCKET NO. 2010-0660-AIR**

APPLICATION BY TOMMY DAVIS	§	BEFORE THE STATE OFFICE
	§	
DBA SLICK MACHINES FOR TCEQ	§	OF
	§	
AIR PERMIT NO. 82199L002	§	ADMINISTRATIVE HEARINGS

**EXECUTIVE DIRECTOR’S REPLY TO PROTESTANTS’ EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGES’ PROPOSAL FOR DECISION**

TO HONORABLE CHAIRMAN SHAW, AND COMMISSIONERS GARCIA AND
RUBINSTEIN

COMES NOW the Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) and files this Executive Director’s Reply to Protestants’ Exceptions to the Administrative Law Judges’ Proposal for Decision (PFD), and in support thereof shows the following:

I. INTRODUCTION/BACKGROUND

On July 25, 2008 Tommy Davis dba Slick Machines (Slick Machines or Applicant) filed an application with the TCEQ for change of location of a permanent rock crusher to a location referred to as the Parham tract in Glen Rose, Somervell County, Texas. The commission considered the application and hearing requests at a regularly scheduled Agenda on June 30, 2010 and referred the matter to the State Office of Administrative Hearings (SOAH) for a contested case hearing. SOAH held a preliminary hearing on September 16, 2010. On January 14, 2011, after the Applicant filed prefiled testimony in the form of a one page list of statements, Protestants Chalk Mountain Foundation, Inc., Charles Brown and Darrell Best (Protestants) filed a motion for summary disposition or, in the alternative, for sanctions or other discovery relief.

Executive Director's Reply to Protestants' Exceptions to the ALJs' Proposal for Decision
Application of Tommy Davis dba Slick Machines for Permit No 82199L002

SOAH granted this motion on February 14, 2011 and issued a Proposal for Decision (PFD) on March 3, 2011 recommending denial of the application based on the Applicant's failure to meet his burden of proof. On March 23, 2011, Protestants filed exceptions to the PFD requesting the addition of an ordering provision to the ALJ's proposed order giving Protestants' counsel notice of, and an opportunity to contest any application filed in the next year for authorization to operate a rock crusher on the Parham tract under a standard permit. The ED files this reply regarding the law and rules addressing notice and hearing opportunities for rock crusher standard permit registrations.

II. ARGUMENT

A. Notice requirements for Air Quality Standard Permit for Permanent Rock and Concrete Crushers do not require mailed notice

Protestants request for the addition of an ordering provision giving Protestants' counsel notice of an authorization to operate a rock crusher on the Parham tract under a standard permit is beyond the scope of TCEQ rules and requirements for notice under the rock crusher standard permit. The specific public notice requirements for permanent rock crushers are listed in Section 2 of the standard permit, requiring published notice in a newspaper of general circulation in the municipality in which the plant is proposed to be located or in the municipality nearest to the proposed location of the crusher by a specified date.¹ Additionally, the standard permit requires bilingual

¹ Section 2 of the standard permit for permanent rock and concrete crushers states hereinafter references to the standard permit will be to the section number only: "(A) An application for authorization to construct and operate a rock crusher under this standard permit is not subject to the public notice requirements in 30 TAC Chapter 39 Subchapter H, Applicability and General Provisions, and Subchapter K, Public Notice of Air Quality Applications. (B) For authorization to use this standard permit, an

Executive Director's Reply to Protestants' Exceptions to the ALJs' Proposal for Decision
Application of Tommy Davis dba Slick Machines for Permit No 82199L002

notice be published at least once in an additional publication of general circulation in the municipality or county in which the plant is proposed to be located under certain conditions.² Finally, the standard permit also specifies sign posting requirements for English and alternative language signs.³ However, there is no requirement in the TCEQ rules applicable to rock crusher standard permits or in the standard permits themselves that requires specific mailed notice to surrounding land owners or other persons who may be affected by the registration to use the rock crusher standard permit. Therefore, Protestants' request goes beyond the requirements provided by law and rules applicable to the standard permit for rock crushers.

B. There is no opportunity for a contested case hearing under rules applicable to standard permits.

Protestants' request for the addition of an ordering provision giving Protestants' counsel an opportunity to contest any application filed in the next year for authorization to operate a rock crusher on the Parham tract under a standard permit is not supported by law or TCEQ rules. The applicability of TCEQ rules relating to Requests for Reconsideration or Contested Case Hearing are described in 30 TAC §55.101.

applicant must publish notice under this section not later than the earlier of: (i) the 30th day after the date the applicant receives written notice from the executive director that the application is technically complete; or (ii) the 75th day after the date the executive director receives the application.

² Subsection 2(c) states: "The applicant must publish notice at least once in a newspaper of general circulation in the municipality in which the plant is proposed to be located or in the municipality nearest to the proposed location of the crusher. If the elementary or middle school nearest to the proposed plant provides a bilingual education program as required by Subchapter B, Chapter 29, Texas Education Code, the applicant must also publish the notice at least once in an additional publication of general circulation in the municipality or county in which the plant is proposed to be located that is published in the language taught in the bilingual education program. This requirement is waived if such a publication does not exist or if the publisher refuses to publish the notice."

³ Subsections 2E-I outline the specific signposting requirements.

Executive Director's Reply to Protestants' Exceptions to the ALJs' Proposal for Decision Application of Tommy Davis dba Slick Machines for Permit No 82199L002

Specifically, § 55.101(g)(9) states: “Subchapters D – G (relating to Applicability and Definitions; Public Comment and Public Meetings; Requests for Reconsideration or Contested Case Hearing; and Requests for Contested Case Hearing and Public Comment on Certain Applications) of this chapter do not apply to air quality standard permits under Chapter 116 of this title.” Furthermore, 55.101(f)(6) states that Subchapters D - G of this chapter do not apply to hearing requests related to applications where the opportunity for a contested case hearing does not exist under other laws. There are no other laws providing for a contested case hearing for standard permits. TCEQ rules in Chapter 116, subchapter F lay out the general conditions applicable to the issuance (creation) of, amendments to, and registration to use a standard permit. Section 116.605(g) states specifically that the issuance, amendment, or revocation of a standard permit or the issuance, renewal, or revocation of a registration to use a standard permit is not subject to Texas Government Code, Chapter 2001.⁴ Therefore, there is no opportunity under applicable law or TCEQ rules for a contested case hearing for either the permanent or temporary standard permits for rock crushers.

III. CONCLUSION

As outlined above, Protestant’s requests additional ordering provisions related to additional notice and contested case opportunity are not supported by law and rules applicable to the issuance of standard permits for rock crushers.

⁴ Texas Government Code Chapter 2001 specifies the administrative procedures for state agencies including public participation in the rulemaking process, and the general rights and procedures for contested cases.

Executive Director's Reply to Protestants' Exceptions to the ALJs' Proposal for Decision
Application of Tommy Davis dba Slick Machines for Permit No 82199L002

Respectfully submitted,

Texas Commission on Environmental Quality
Mark R. Vickery, P.G., Executive Director

Stephanie Bergeron Perdue, Deputy Director
Office of Legal Services

Robert Martinez, Director
Environmental Law Division



Erin Selvera, Staff Attorney
Environmental Law Division
State Bar No. 24043385
(512) 239-6033
Erin.Selvera@tceq.texas.gov
P.O. Box 13087, MC 173
Austin, Texas 78711-3087

REPRESENTING THE EXECUTIVE
DIRECTOR OF THE TEXAS COMMISSION
ON ENVIRONMENTAL QUALITY

CERTIFICATE OF SERVICE

I certify that true and correct copies of the foregoing Executive Director's Reply to Protestants' Exceptions to the ALJs' Proposal for Decision have been served on the following in the manner indicated below on this 4th day of April, 2011.



Erin Selvera
Staff Attorney
Environmental Law Division

SERVICE LIST
TOMMY DAVIS dba SLICK MACHINES
PERMIT NO. 82199L002
SOAH DOCKET NO. 582-10-5281
TCEQ DOCKET NO. 2010-0660-AIR

FOR SOAH:

VIA: Facsimile
The Honorable Craig R. Bennett
Administrative Law Judge
State Office of Administrative Hearings
300 West 15th Street
Austin, TX 78701
Tel: (512) 475-4993
Fax: (512) 322-2061

VIA: Facsimile
State Office of Administrative Hearings
Attn: SOAH Docket Clerk
P.O. Box 13025
Austin, TX 78711-3025
Tel: (512) 475-4993
Fax: (512) 322-2061

FOR THE APPLICANT

VIA: E-mail and Regular Mail
Mr. Tommy Davis
Slick Machines
762 Spillway Rd.
Brownwood, Texas 76801-0940
Tel: (325) 784-8030
Email: slickservices@hotmail.com

**FOR THE OFFICE OF PUBLIC
INTEREST COUNSEL**

Via E-mail
Mr. Eli Martinez
Texas Commission on Environmental
Quality
Public Interest Counsel, MC103
P.O. Box 13087
Austin, Texas 78711-3087
Tel: (512) 239-3974
Fax: (512) 239-6377
Email: Eli.martinez@tceq.texas.gov

FOR PROTESTANTS

VIA: E-mail
David Frederick, Counsel
Richard Lowerre, Counsel
Lowerre, Frederick, Perales, Allmon &
Rockwell
707 Rio Grande, Suite 200
Austin, Texas 78701
Tel: (512) 469-6000
Fax: (512) 482-9346
Email: dof@lf-lawfirm.com (Frederick)
rl@lf-lawfirm.com (Lowerre)

FOR THE CHIEF CLERK

VIA: E-file and hand delivery
LaDonna Castañuela
Office of the Chief Clerk
Texas Commission on Environmental
Quality
Office of the Chief Clerk, MC-105
P.O. Box 13087
Austin, Texas 78711-3087